No. 2685

United States

Circuit Court of Appeals

For the Ninth Circuit.

W. L. WILSON, EMIL E. LENGUETIN, FRED F. CONNOR, JOHN A. BLOOM, LAWRENCE HOBRECHT and BENJ. F. CURRIER,

Petitioners,

vs.

THE CONTINENTAL BUILDING AND LOAN ASSOCIATION, a Corporation, et al.,

Respondents.

In the Matter of CONTINENTAL BUILDING AND LOAN ASSOCIATION, Bankrupt.

TRANSCRIPT OF RECORD IN SUPPORT OF PETITION FOR REVISION

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Northern District of California, First Division.

In the United States District Court for the Northern District of California, First Division.

No. 9509.

In the Matter of CONTINENTAL BUILDING AND LOAN ASSOCIATION,

In Bankruptcy.

Praecipe for Transcript on Petition for Review to the Circuit Court of Appeals of the United States.

To the Clerk of the United States District Court for the Ninth Judicial District, Northern Division:

You are requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals upon the petition for review filed in that court by W. L. Wilson et al. in the above-entitled proceeding, and to include in said transcript the following:

1. Petition for Review by United States District Court of the decision of the referee in bankruptcy.
2. Certificate of Referee.
3. Order of District Court Affirming the Decision of the Referee.
4. Clerk's Certificate.

Dated San Francisco, Cal., December 6, 1915.

B. M. AIKINS,

Attorney for said W. L. Wilson et al. [1*]

*Page-number appearing at foot of page of original Petition for Revision.

Received copy of within this 16th day of December, 1915.

NAT SCHMULOWITZ,
Atty. for the Bankrupt.

R. P. HENSHALL,
Atty. for Merchants' National Bank.
GEORGE W. MORDECAI,
Atty. for JAMES McCULLOUGH.
REUBEN G. HUNT,
HUGO D. NEWHOUSE,
HELLER, POWERS & EHRMAN,
Attys. for Certain Creditors.

J. G. DE FOREST,
Atty. for Certain Creditors.

WALTER D. MANSFIELD,
Atty. for Certain Creditors.

J. S. HUTCHINSON,
Atty. for Certain Creditors.

W. C. CAVITT,
Atty. for Certain Creditors.

JOHN YULE,
Atty. for Certain Creditors.

[Endorsed]: Filed Dec. 21, 1915, at 10 o'clock and 20 min. A. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the United States District Court for the Northern District of California, First Division.

No. 9509.

In the Matter of CONTINENTAL BUILDING AND LOAN ASSOCIATION,
In Bankruptcy.

Petition for Review of Order of Referee Disapproving Election of Anglo-California Trust Company as Trustee.

To the Honorable, the Judge of the District Court of the United States, for the Northern District of California, First Division thereof:

The petition of W. L. Wilson, Emil E. Lenguetin, Fred F. Connor, John A. Bloom, Lawrence Hobrecht and Benj. F. Currier, creditors of said bankrupt, respectfully sheweth that on the 15th day of September, 1915, manifest error to the prejudice of your petitioners, was made by the referee in said matter in an order disapproving the election of the Anglo-California Trust Company as trustee herein, and ordering a new election.

The errors complained of are:

First. That the Anglo-California Trust Company was elected by a great majority of the creditors present or represented at said meeting, both in number of creditors and in the amount of their claim, but was without adequate cause disapproved.

Second. That the Anglo-California Trust Company is not disqualified to act as a trustee by reason of its having acted as the depositary of the securities of the bankrupt, if true; and that no proof was offered or made of such alleged fact, and the fact was not so found. [3]

Third. That said Trust Company is not disqualified to act as trustee by reason of its having acted as trustee under deeds of trust for the bankrupt, if true; and that no proof was offered of such alleged

fact, and the fact was not so found.

Fourth. That said Trust Company is not disqualified by reason of the necessity of the trustee herein to examine into the relation existing between the said company and the bankrupt, if true; and that no proof was offered of such alleged necessity, and the fact was not so found.

Fifth. That the said Trust Company is not disqualified by reason of the counsel of the bankrupt being an attorney of the said company, even though true; and that no proof was offered or made of such fact, and that the fact was not so found and that such is not the fact.

Sixth. That it is not true that the election of the said Trust Company was produced or brought about by activity on the part of the officers, directors and attorneys of the bankrupt.

Seventh. That there was no evidence before the referee to show any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, to produce or bring about the election of said Trust Company.

Eighth. That there was no evidence before the referee to show that any activity on the part of the officers, directors and attorneys, of the bankrupt, or any of them did in fact influence any of the creditors to vote for said Trust Company as such trustee.

[4]

Ninth. That there was no evidence before the referee to show that such alleged activity did influence the votes of a sufficient number of creditors, if any, to change the result of the election.

Tenth. That the evidence wholly fails to show that the persons whose alleged activity was deemed obnoxious by the referee were not all stockholders, with the same qualified status of creditors as those who opposed its election:

Eleventh. That the decision of the referee in effect disfranchises the said officers, directors and attorneys.

Twelfth. That the said decision complained of in effect disfranchises the majority of the creditors for the benefit of the minority.

Thirteenth. That the decision complained of constitutes an abuse of discretion on the part of the referee.

WHEREFORE, your said petitioners pray that the record herein may be certified up; and that the ruling of the referee be reversed and set aside and the election of Anglo-California Trust Company as trustee herein be approved and confirmed.

B. M. AIKINS,
Attorney for Petitioners.

[Endorsed]: Filed Sept. 27, 1915, 2:45 P. M., A. B. Kreft, Referee. [5]

In the District Court of the United States, Northern District of California, First Division.

Before ARMAND B. KREFT, Referee in Bankruptcy.

No. 9509.

In the Matter of CONTINENTAL BUILDING & LOAN ASSOCIATION,

In Bankruptcy.

Referee's Certificate on Petition to Review.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California:

The undersigned, referee in bankruptcy, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on the 15th day of September, 1915, an order was made herein disapproving the election of the Anglo-California Trust Company as trustee of the estate of said bankrupt. On September 27th, 1915, within the time extended by the referee, W. L. Wilson, a creditor herein, and six other creditors, feeling aggrieved by said order, filed a petition to review the same.

I will endeavor to state briefly the proceedings had in this matter leading up to the making of the order reviewed.

The first meeting of creditors herein was called for the 30th day of August last, for the purpose, among other things, of choosing one or three trustees herein. On the election of [6] trustee the claims were largely represented by attorneys-in-fact to whom the creditors had given power to vote the same at such election.

Nearly one hundred claims, aggregating about $60,000, voted for the Union Trust Company; 184 claims aggregating about $123,000, were voted for W. L. Williams, state superintendent of banks; over 500 claims aggregating nearly $400,000 were voted for B. G. Tognazzi. Owing to the large number of

claims presented, the exact number and amount of the claims voted were not computed, it being conceded that Mr. Tognazzi had received the vote of both a majority in number and amount of claims of creditors present or represented. Of the claims voting for Mr. Tognazzi, about 500, aggregating about $375,000, were voted by Mr. James McCullough, president of the Continental Building & Loan Association, upon powers of attorney executed to him. Mr. Hugo Newhouse, representing claims voted for the Union Trust Company, and Mr. R. G. Hunt, representing claims voted for Mr. W. R. Williams, opposed the approval of Mr. Tognazzi as trustee on the ground that his election was brought about through the influence of officers and attorneys for bankrupt, Mr. McCullough being the president of the bankrupt could not be permitted to exercise proxies for the choice of trustees. It appearing to me that the choice of Mr. Tognazzi had been influenced by the acts of the officers and attorneys connected with the bankrupt corporation, I disapproved the election, and continued the meeting of the creditors to the 15th day of September for choice of another trustee, stating in open court to the effect that directors, officers and attorneys of the bankrupt would not be permitted to participate in the election or influence claimants as to whom they should vote for in the choice of trustee, and that [7] Mr. Tognazzi could not again be a candidate. Mr. Gavin McNab has been the leading counsel for the Continental Building & Loan Association for some years; Mr. Nat Schmulowitz, who appears of record herein as

attorney for the bankrupt, and who appeared for the bankrupt at the session aforesaid, is an associate of Mr. Gavin McNab. Mr. George W. Mordecai who was present at the session aforesaid is also an associate of Mr. McNab. Shortly after that session Mr. Mordecai called upon me and stated in substance that they did not desire to do anything contrary to my wishes in the matter of this selection, and spoke of the shortness of time for the creditors who had given letters of attorney to Mr. McCullough to obtain other representation; that many of them resided out of this city. I stated that if the time was found to be too short, further time would be given; that I appreciated the difficulty of the creditors in obtaining proper representation because of their number and various places of residence, and suggested that a meeting of the creditors represented by Mr. McCullough, who resided in or near this city, might be called; that I saw no objection to Mr. McCullough calling said meeting, and advising them that he could not represent them, but that he should not participate in their meeting; that at such a meeting the creditors might determine on some line of action and take the matter up with distant creditors represented by Mr. McCullough, or for that matter, with any other creditors whom they might desire to have join with them; that the election showed that a substantial majority had chosen Mr. McCullough to represent them, and that I desired that they should have ample opportunity to be present or represented, but that I must insist that the crediors choose a trustee without suggestion of the attorneys, officers or directors of the bankrupt. [8]

At the meeting on September 15th Mr. Joseph A. Leonard voted 391 claims, aggregating $305,437.50 for the Anglo-California Trust Company as trustee, being mainly claims for which he had been substituted as attorney in fact in the place of Mr. McCullough. Fourteen other claims aggregating about $15,000, were also voted for the Anglo-California Trust Company; 107 claims, aggregating about $62,000 were voted for the Union Trust Company and 202 claims, aggregating about $140,000 were voted for Mr. Williams. The Anglo-California Trust Company received a majority in number and amount of claims of creditors present or represented at this meeting, Mr. Hunt, on behalf of the creditors voting for Mr. Williams and for the Union Trust Company objected to the election of the Anglo-California Trust Company on the grounds: First, that said company has been and now is the depositary of the Continental Building & Loan Association and has acted as trustee on its deed of trust; second, that its election was brought about by activity on the part of the officers, directors and attorneys of the bankrupt. (Transcript pages 38 and 39.)

Certain witnesses were examined and documentary evidence was offered in support of these objections. The substance of the testimony and evidence is as follows:

Exhibit "A," is a circular letter under date of August 5, 1915, sent to the stockholders of the bankrupt by its directors, setting forth the reasons of the board of directors in placing the association in the Federal Court for liquidation, and recom-

mending Frank H. Gould as a suitable person for trustee. The letter refers to enclosed claim and to proxy to James McCullough, president of the bankrupt, and recommends the execution of said papers. Exhibit "B" is a letter dated August 14, 1915, addressed to the stockholders by the directors, and concerns alleged acts of brokers and speculators [9] who it was charged were seeking to influence the stockholders. Exhibit "C" is a letter to stockholders, dated August 16, 1915, signed by certain stockholders, and contains a statement concerning the action of one William H. Cox and the candidacy of Mr. Williams for trustee. Exhibit "D" is a letter to Mr. McCullough from a stockholder acknowledging the receipt of claim and proxy. Exhibit "E" is form of claim and proxy sent out with letter exhibit "A." Mr. Corbin, secretary and general manager of the bankrupt, testified that the letter, exhibit "A," was prepared on the evening of August 7th, the day on which the petition herein was filed, and that Mr. McNab was the moving spirit in the preparation of such letter. (Pages 14 and 15.)

Referring to the compilation of the letter, exhibit "C," of certain stockholders to the other stockholders, Mr. Corbin testified: "I rather think Mr. McNab had something to do with it."

He also stated that he, Corbin, talked to most of the stockholders who signed the letter, about signing. (Page 15.)

Exhibits "A" to "E" were admitted in evidence to show acts of the officers of the bankrupt after the commencement of this proceeding, concerning the

election of trustee herein, up to August 30th, the date of the first meeting of creditors.

Concerning the acts of officers and attorneys of the bankrupt after said meeting of creditors of August 30th, and before the meeting of creditors herein of September 15th, the following testimony was received:

Mr. McCullough testified that within 24 hours after the meeting of August 30, a directors' meeting of the bankrupt was held, at which Mr. Mordecai, Mr. Jarman and Mr. Corbin were present; that he thought Mr. McNab was also present. In regard to what [10] was said at said meeting he testified: (Page 7.)

> "Q. Can't you remember anything that was said at that time?
>
> A. Well, the only thing was that I was not acceptable; that I could not qualify to cast the votes, and that they would have to have somebody else.
>
> Q. Were any names suggested as to who would be the proper person?
>
> A. Mr. Leonard was suggested.
>
> Q. Was there any discussion as to what procedure should be taken by you and the rest of the directors?
>
> A. Nothing except that they were to send out for other proxies and get instructions.
>
> Q. You mean proxies for Mr. Leonard?
>
> A. Yes."

Concerning the meeting of creditors referred to by Mr. McCullough, Mr. Mordecai testified: (Page 31.)

"The WITNESS.—With regard to this meeting that Mr. McCullough spoke about which took place after the last hearing in court, there was no such meeting, either formally or informally. Following that meeting I reported at that office what had taken place down here, the ruling of the referee in regard to Mr. McCullough. And I think that Mr. McCullough and Mr. McNab and myself were present. I think those were the only ones. And the only thing that took place at that time was a discussion as to whether or not anything could be done with the proxies that Mr. McCullough held; whether they could have someone to represent them, since he was disqualified; and it was decided to call a meeting of the stockholders of the association; and pursuant to that, this meeting in the Pacific Building was called. Mr. Leonard's name was not mentioned at that time, at that meeting, nor was the name of any other person for trustee presented at that meeting."

The meeting referred to by Mr. McCullough was evidently an informal conference. After this conference a letter, exhibit "F," signed by Mr. McCullough, not dated, was sent out. This was within 24 hours after the meeting of creditors of August 30th, Mr. McCullough testified that he believed it was sent out to all the stockholders. (Page 7.) This letter contains the following statement: "I will immediately assemble the San Francisco stockholders and obtain an expression of their wishes and request them to organize themselves and send a communica-

tion to their fellow stockholders and creditors throughout the state." No time or place of said meeting is stated therein. Concerning this stockholders' meeting Mr. McCullough testified: (Page 8). [11]

"Q. That letter in fact stated that there was going to be a meeting of creditors called?

A. Yes.

Q. How did you call that meeting, Mr. McCullough? A. By letter notifying them.

Q. Was it a postal card or a letter?

A. A letter.

Q. And how was that sent?

A. Sent to the different stockholders.

Q. All the stockholders, or certain ones?

A. All the stockholders in the City and in Oakland.

Q. Just those around the bay?

A. Yes. I am not sure whether I—

Q. This called for a meeting to be held where?

A. I don't think it was specified at the time.

Q. Didn't it tell them where to go? A. Yes.

Q. Was it the Pacific Building?

A. The Pacific Building, yes."

Under date of September 1st, a circular letter was addressed to the stockholders, signed "Wallace Bradford, chairman of meeting." (Exhibit "G.") This letter states in the opening paragraph that a meeting was held in the Pacific Building, room 916, on the 31st day of August, 1915, by the stockholders in San Francisco who had given their proxies to Mr. McCullough after written notice to every such stock-

holder in San Francisco of said meeting.

The written notice given by Mr. McCullough calling the stockholders' meeting at the Pacific Building was not produced. According to the letter, exhibit "G," this meeting was held the day after the creditors' meeting in my office at which Mr. Tognazzi's election was disapproved. This time, in my opinion, was insufficient to obtain a representative stockholders' meeting. I do not understand why in the circular letter, exhibit "F," the time and place of meeting was not stated and why it was necessary to send another communication fixing the time and place.

Under date of September 2, 1915, Mr. McCullough addressed another letter to the stockholders. (Exhibit "H.") In which he states, in part, that he was unable to vote the proxies for Mr. Frank H. Gould, as trustee, on account of his possibly being disqualified by holding a Federal position, and sickness; he therefore voted them for Mr. B. G. Tognazzi, who, for many years, was manager of the [12] Central Trust Company, now the Anglo-California Trust Company, which trust company holds the securities of the Continental Building & Loan Association, and who is now the manager of the California Central Creameries. He further states:

> "In order to meet any possible objection, and at the suggestion of the Referee in Bankruptcy, I called a meeting of all the stockholders in San Francisco, who had given me their proxies, by giving written notice to every such stockholder.
>
> These stockholders assembled in large num-

bers on August 31st, 1915, at Room 916, Pacific Building, San Francisco, and elected Mr. Wallace Bradford and Mr. Robert Coulter, president and secretary, respectively, of the meeting, these gentlemen being stockholders of long standing, and unanimously decided to send a communication to all the stockholders who had given their proxies to me, setting forth the facts, and asking that a substitution of proxy be sent to Mr. Joseph A. Leonard, 970 Phelan Building, San Francisco, so that the interests of the stockholders themselves, might be represented and protected at the meeting before the Referee in Bankrupcty on September 15, 1915."

He stated that he thought that Mr. McNab prepared the letter, exhibit "H." (Page 10.)

Concerning the meeting at the Pacific Building, Mr. McCullough testified, pages 8 and 9, that Mr. Leonard was there at the request of Mr. Yule, a stockholder; that he, Mr. McCullough, did not take an active part in this meeting; that he introduced Mr. Yule; that Mr. Bradford was the chairman, but he did not know who suggested Mr. Bradford as chairman, that there were about 50 persons present at said meeting. (Page 9.)

William Corbin testified that he had been secretary and general manager of the bankrupt for a good many years. He stated that he tried to follow the instructions of the Court in respect to the order of the Court in this matter. (Referring to my remarks at the first meeting of creditors on August 30th respecting the participation of officers of the bank-

rupt in the matter of the election of trustee.) Being asked as to whether he has since made attempts to induce stockholders to give their proxies to Mr. Leonard, he testified that when people asked his advice as to whom they should give their proxies to, he told them "Mr. Leonard." (Testimony, page 17.) [13]

In reply to the question: "When was it decided that Mr. Leonard should cast his vote for the Anglo-California Trust Company?" he answered: "I don't know."

"Q. Do you know when notice was sent out of the decision? A. It was sent out last night.

Q. Who sent it out?

A. Who physically sent it out?

Q. Yes. A. I did.

Q. You did? A. Yes; my force did.

Q. At whose request?

A. At Mr. Leonard's request."

The notice is marked exhibit "J."

Mr. J. B. Osborn testified, on being shown exhibit "C," which is the circular letter signed by certain stockholders, which includes Mr. Osborn as a signer, that he knew nothing about the letter at all. Replying to the question: "Has anybody called you up within the last week in reference to how you should vote in the last meeting?" he answered, "Mr. Corbin."

"What did he tell you?

A. Well, he advised me that Mr. Leonard was a good man for the place.

Q. He advised you to vote for Mr. Leonard?

A. As being a good man for the place." (Page 20.)

Joseph A. Leonard testified that he is manager of the Urban Realty Improvement Company; that Mr. Gavin McNab is an attorney of the company and a director thereof; that Judge Yule was the first party who spoke to him about acting as proxy holder in this matter; that he was at the meeting in the Pacific Building at the request of Judge Yule; that the proxies to him were received at his, Mr. Leonard's office. I quote the following from his testimony (page 24):

"Q. Who picked the Anglo-California Trust Company as the candidate for whom you should vote?

A. I don't know who that was, I called up Mr. Cordray, the trust officer, and asked him if it was satisfactory to him.

Q. Why did you happen to call him up?

A. Because I had understood from him that he had been requested to act as trustee.

Q. And he told you that he had been requested to act? A. Yes.

Q. Do you know who requested him?

A. I do not.

Q. Did he tell you who requested him?

A. He did not.

Q. Did you have anything to do with the sending out of this exhibit "J," notifying the stockholders of the selection? A. He did not.

Q. Did you know that it was sent out?

A. I didn't know that it was sent out. I never had seen it." [14]

Mr. N. Schmulowitz, counsel for the bankrupt herein, testified that the following attorneys are associated with Mr. Gavin McNab: Luther Elkins, A. H. Jarman, R. P. Henshall, O. B. Wyman, George W. Mordecai and the witness; that Mr. Jarman and Mr. Mordecai and the witness are also attorneys of the Continental Building & Loan Association. (Page 26.)

Wallace Bradford testified. (Page 34.) That he presided at the meeting at the Pacific Building; that Mr. McCullough was the only officer of the Continental present at said meeting, as far as he knew; that Mr. Coulter was secretary, and nominated the witness for chairman:

I quote the following from his testimony: (Page 35).

"Mr. HUNT.—Q. Mr. Bradford, do you remember attending a meeting of the stockholders held in the Pacific Building along about the 14th of August? A. Yes, sir.

Q. Did you take an active part in the discussions? A. Yes, sir.

Q. Didn't you state to the creditors and stockholders present at that meeting that you thought that Mr. McNab and Mr. Corbin ought to be allowed to remain in the control of affairs?

A. I probably did, because that is my opinion.

Q. It still is your opinion, is it?

A. Yes, sir—most decidedly."

I also quote from his testimony: (Page 37.)

"Q. Who picked the Anglo-California Trust Company?

A. I don't know, except that that was principally the suggestion of the people who were present, and other parties concerned in that transaction.

Q. This card speaks for itself. The purport of it is that the undersigned stockholder's committee, signed by yourself as chairman, wishes to inform you that it is the intention of this committee to request Mr. Leonard to vote for the Anglo-California Trust Company. Who principally suggested the Anglo-California Trust Company?

A. It was the opinion at that meeting that meeting that Mr. Leonard should be elected to that position; that he was to act for those who were at that meeting in deciding upon a proper person to take his place.

Q. Well now, who decided on the Anglo-California Trust Company?

A. That states that Mr. Leonard decided.

Q. No, sir, it does not.

A. Doesn't it state that he decided it?

Q. It states that the stockholders' committee, of which you were acting as chairman, decided it. A. Yes.

Q. Who was it that directed the drafting of that card?

A. You will have to ask the secretary.

Q. You don't know anything about that?

A. No, only that the secretary was authorized to notify the people, when that decision was made." **[15]**

On offering testimony in support of his objection Mr. Hunt stated that he desired to show that Mr. McNab is a director of Anglo-California Trust Company, and that said company has acted as trustee for the Continental Building & Loan Association, but he needed a continuance to call witnesses for this purpose. I stated that if it became necessary to certify the matter to the Court I would permit him to complete this record in this respect. Being satisfied from the evidence already presented that Mr. Hunt's objection should be sustained, I concluded to decide the matter on the record as it then stood.

On September 29th, I was attended upon by Mr. B. M. Aikins, counsel for reviewing creditors, and by Mr. R. G. Hunt. The *follow-* facts were admitted by stipulation between them:

1. That Gavin McNab is a directo*f* of the Anglo-California Trust Co.

2. That, among others, Gavin McNab represents the Anglo-California Trust C. from time to time as an attorney.

3. That the Anglo-California Trust Co. is the trustee named in, and holds, certain securities, to wit, a large number of deeds of trust, securing obligations owing to the bankrupt.

Mr. Aikins, however, objected to the admission of these facts in evidence, which objection was overruled. The trust relationship between the Anglo-California Trust Company and the bankrupt is shown by the statements in the bankrupt's schedules filed herein, from which it appears that the Anglo-California Trust Company is trustee under many

deeds of trust, for the Continental Building & Loan Association.

I would be pleased to have the creditors herein select as trustee a financial institution of equal standing with the Anglo-California Trust Company, but because of its relations with the bankrupt, and the association with it of attorney of the bankrupt, it is my opinion that it should not be the trustee herein.

The stockholders first represented by Mr. McCullough, then by Mr. Leonard have the power, in number and amount, to name [16] the trustee. They have not been deprived of the right of exercising that power, but I hold that they must choose a disinterested person, and that the choice shall be their choice and not that of the officers or attorneys connected with the former management of the bankrupt. Notice that their claims would be voted for the Anglo-California Trust Company as trustee was not sent to them until the night of September the 14th. The election was held on September 15th at 10 A. M., yet in the circular letter, exhibit "G," notifying them that Mr. Leonard had been designated at a stockholders' meeting as proxy holder, they were advised: "Before any trustee is decided upon by us, the name will be submitted to you by mail, with the reasons for the recommendation." This statement is emphasized by being printed in larger type than the remaining portion of the document.

When the powers of attorney such as are given in the present case do not designate the person to be voted for, the attorney-in-fact will name the per-

son, but if the proxy holder is to exercise such power he must be a disinterested person, and not the selection of the officers and attorneys of the bankrupt. The proxy holder, Mr. Leonard, testified that he did not know who selected the Anglo-California Trust Company as candidate for trustee. Mr. Bradford, who was chairman of the meeting at which Mr. Leonard was chosen, testified in effect that he is still of the opinion that Mr. Corbin and Mr. McNab should conduct and lead the liquidation of its concern. While Mr. Bradford is entitled to this view, he is in my opinion not a proper person to lead the creditors in this matter, in view of the instructions of the referee that the officers and attorneys of the bankrupt must hold hands off in this election. Mr. Leonard is the president and manager of a company of which Mr. Gavin McNab is a director and its attorney, and the trustee chosen is a company in which Mr. [17] McNab is also a director and one of its attorneys.

Under these circumstances, even if the attorneys and officers of the bankrupt had nothing whatever to do with this choice, I could not approve the selection.

The courts have uniformly refused to approve of trustees chosen through influence of officers of bankrupts or attorneys for bankrupt.

In re John F. McGill, 5 A. B. R., 161.

In re Rekersdres, 5 A. B. R., 811.

Falter vs. Reinhard, 4 A. B. R., 782; affirmed, 5 A. B. R., 155.

In re Henschel, 6 A. B. R., 25.

In re Dayville Woolen Co., 8 A. B. R., 85.
In re Blue Ridge Packing Co., 11 A. B. R., 36.
In re Gordon Supply Manufacturing Co., 12 A. B. R., 94.
In re Cooper, 14 A. B. R., 320.
In re Eastlack, 16 A. B. R., 529.
In re Hanson, 19 A. B. R., 237.
In re L. W. Day & Co., 23 A. B. R., 56.
In re Fletcher & Ployd, 25 A. B. R., 196.
In re Kreuger, 27 A. B. R., 443.
In re Sitting, 25 A. B. R., 685.
In re Van De Mark, 23 A. B. R., 760. [18]

In this case, at the first meeting, August 30th, the officers of the bankrupt openly sought the appointment of a trustee of their own selection. Of this I have no criticism to make, they acted openly, under the belief that they had such right because *because* of the exceptional relationship between the stockholders as creditors and as members of the bankrupt corporation, and in which latter capacity they are liable to outside creditors upon stockholders' liability for the debts of the corporation. The referee, however, having disapproved of this course, they should have appealed to the judge by review of referee's order before the next election was held, if they considered that they were acting within their right. In my opinion the evidence shows that the officers and attorneys of the bankrupt have dictated the steps leading up to the choice of the Anglo-California Trust Company, and evidences a determination on their part to control the administration of this estate in this court.

A second petition to review another order herein has been filed by the Merchants National Bank of San Francisco, which is sent up under a separate certificate. The Merchants National Bank is an outside creditor, having a claim for $2,611.20. It takes the position that as the stockholders are liable for the debts of the corporation, its claim is entitled to priority, and must be paid in full. Its petition for review is based upon the proposition that the outside creditors alone are entitled to name the trustee; that stockholders of the bankrupt are disqualified. At the meeting of September 15th, counsel for the Merchants National Bank sought to vote this claim and to exclude all stockholders from participating in the election. In my opinion, the taking of this petition to review emanates from the office of counsel for the bankrupt. It is represented by an attorney associated with the attorney for the bankrupt. In addition to said Merchants National Bank there are only two creditors who are not stockholders, and their claims amount to $9,587.70. [19]

Considering that the indebtedness to the stockholders as scheduled amounts to $751,434.65 and that the assets which are scheduled at $769.508.13 will, with the exception of the few outside creditors named, be distributed to the stockholders, I can have no patience with a creditor who is claiming the right to be paid in full and who attempts to take the administration of this estate upon a claim of $2,611.20 out of the hands of the creditors representing $751,434.75 upon a technicality of the kind presented. In my opinion, this is a further attempt

upon the part of the officers of the Continental Building & Loan Association to control the administration of this estate.

An involuntary proceeding in bankruptcy was brought against the Continental Building & Loan Association in 1912 in this court and an opposition was entered by it, and the case was referred to me to ascertain and report the facts and my conclusions thereon. My report was filed on January 16, 1913, in which I found that the association was solvent and had not committed the acts of bankruptcy charged, and the proceeding was dismissed. In my report I considered at length the nature of associations of this character and the rights of the stockholders as creditors in the event of bankruptcy proceedings. I quote the following from page 19 of said report:

> "There is no independent stock of this association. Its capital stock consists of the dues paid in by its members. The Land and Building Act as amended (Civil Code, Section 634) reads: 'The capital stock shall consist of the accumulated dues, together with the apportioned profits of the corporation.' There is also a provision for the usual stockholders' liability upon debts owing by the corporation to outside creditors.
>
> In what respect do the stockholders of such an association differ from the stockholders of ordinary commercial corporations,
>
> The case of Towle vs. American Building, Loan and Investment Co., 61 Fed. 466, Grosscup,

District Judge, is a leading case referred to by the courts.

Concerning the nature of these corporations, I quote the following from this decision: [20]

'These associations are essentially corporate copartnerships. They have no function except to gather together, from small, stated contributions, sums large enough to justify loans. Their officers are the agents of every stockholder, and whether a stockholder is creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund. The insolvency of such an institution is *suie generis*. There can be, strictly speaking, no insolvency, for the only creditors are the stockholders by virtue of their stock. The so-called insolvency is such a condition of the affairs of the association as reduces the available and collectible funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their actual contributions, dollar for dollar. The association does not deal as a corporate entity with its borrowers as stranger. The by-laws determine who become borrowers, and the officers, who are agents of such borrowers, as well as of the remaining stockholders, in the transaction, simply execute these by-laws. None of the liabilities or maxims, therefore, which apply to contracts between strangers are applicable to these transactions. The transaction of bor-

rowing is not between strangers, or the result of contract or dealing, but is simply the execution of pre-existing rights among the stockholders. I think it plain that, when the condition of the association shows that, instead of making profits, it loses the principal of the contributing stockholders, there is power in a court of equity to wind up its affairs upon purely equitable principles. . . .

The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as is possible.' "

I also quote from page 22 of said report as follows:

"But there is another principle of these associations to be considered, and out of which a condition of insolvency may arise, peculiar to such associations, and that is the right given by law to every member to withdraw from the association and receive such an amount of what he has paid in, and profits earned, less penalties for withdrawal, provided by law. The right of

withdrawal is absolute. While by virtue of his membership he is liable for the debts of the corporation to outside creditors in the proportion represented by his stock, as between the association and himself, the association cannot compel him to complete his stock subscription. There is, therefore, an absolute obligation on the part of the association to pay all members such withdrawal value, and this establishes a condition of debtor and creditor." [21]

I also quote from page 23 of said report as follows:

"To the extent of the obligation of the corporation to pay the withdrawal value of the stock based upon profits actually existing, the identity of the corporation is distinguished from that of its members. If the corporation is solvent they can in law or in equity recover such withdrawal value. If the corporation is unable to pay back the principal paid in a state of insolvency exists. In the opinion of the referee the stockholders have provable claims in bankruptcy to this extent, and are entitled to their proportionate share of the profits, if any."

In view of the fact that the stockholders themselves choose the officers to manage their affairs, and that there is no capital stock other than the dues and sums paid in by the stockholders, there is much force in the contention that this proceeding partakes more of a liquidation between the persons constituting the bankrupt corporation, than a liquidation between a bankrupt and its creditors, and that the usual rules governing relations between bankrupts

and creditors do not apply; that the reason why bankrupts are not permitted to influence appointments of trustees is that the bankrupt's property passes from him, and he has no further interest therein, but remains subject to an examination and accounting to his creditors. He should, therefore, not have a voice in the naming of the person who is to investigate his acts; but in this case the identity of the bankrupt and the creditors being one and the same, if the majority of the stockholders so desire, they should have the right to direct that the liquidation be conducted by their officers.

It is along this line of reasoning, I understand, that the officers and attorneys considered it proper for them to suggest a candidate for trustee, and to request the members to send authority to the president of the association to vote their claims.

I do not agree with this position, for the following reasons: [22]

To assist members in building and paying for their homes was originally the primary object of building and loan associations, and the members took an active part in the management of the business. But such associations have developed commercially. Laws have been passed regulating their conduct in this state; the office of Building & Loan Commissioner is established by law, to examine into the affairs of such concerns—this, I take it, for the protection of the public dealing with them. An association such as the Continental Building & Loan Association, having more than fifteen hundred members, with assets aggregating approximately a mil-

lion dollars, is a great financial institution. The schedules herein show that it owes to Class C. stockholders $302,869. This stock does not represent monthly savings of its members, but is fully paid up stock, paid in at the time the stock is issued. The member buying this class of stock receives a certificate with interest coupons attached, payable semi-annually, and on which he receives 6 per cent on the money paid for his stock, but does not otherwise participate in the earnings of the association. This has all the features of a savings bank account paying 6 per cent interest. (Schedules, pages 4 to 22.)

Class D stock, scheduled at $46,013.34 as owing thereon, represents stock issued for money deposited subject to check drawn on the association. This is substantially a commercial bank account. (Schedule, pages 59 to 61.)

Class DC stock (schedules 49 to 55) is issued to Borrowers and held by the association under assignment to it as security for repayment of loans. The DC stock referred to in pages 56 to 58, amounting to $15,106 is similar to the last above-mentioned stock, being assigned to the association as security on payments of installments upon contracts of sale, instead of repayment of loans. **[23]**

The other classes of stock are installment stocks, the holders thereof making monthly payment to the association. Class F stock (schedules 23 and 44), amounts to $291,087.48. Classes A, E and G (pages 45 and 46), amount to $15,503.65. Class I (pages 47, 48), amounts to $27,341.90. The total of install-

ment stock is $339,932.83. I refer to these classes of stock to show the character of the business transacted.

Mr. Corbin has been general manager for many years, and Mr. Gavin McNab its principal attorney. It is obvious that the great body of stockholders do not take in active part in the details of the business. As in other large financial institutions, policies and business management of the concern are left to its officers whose duties and obligations are fixed by law. In this case, at the time of the filing of the petition the board of directors consisted of Mr. Corbin, its general manager, Mr. McCullough, its president; A. H. Jarman, George W. Mordecai and N. Schmulowitz; the three last-named being attorneys and associates of Mr. Gavin McNab. counsel for the association. It is my opinion that when such an institution, so managed and controlled, invokes the jurisdiction of the bankruptcy court to liquidate its affairs, a fair and impartial administration, including an investigation into the acts of the officers, if such investigation becomes necessary, requires that the trustee choosen shall be free from alliance with the corporation or any of its officers or attorneys, and that the officers and attorneys take no part in the selection of the trustee.

A further reason why in this case this should be strictly enforced is that since the association suspended active business, a partial liquidation has been had under the direction of its officers, as appears from the circular letter of August 5, 1915, sent out by the directors to the stockholders, announcing [24]

the filing of the petition herein, and which contains the following:

"Dear Sirs: Your Board of Directors enclose herewith, a statement of affairs of your association. Since the attacks, made upon the Association by Building & Loan Commissioner Walker —the righteousness of which attacks was denied by the Courts in judgments adverse to the Commissioner—your Board of Directors deemed it unwise to transact new business, as continual official hostility would have made such course unprofitable to the stockholders.

Expenses were reduced as far as possible, and every effort was made to expedite liquidation. During this time there has been paid to the stockholders, in the order provided by law, over five hundred thousand dollars. As the assets of the corporation are in long-term mortgages, which cannot be called, and real estate, we consider this excellent progress.

We call the stockholders' attention to the fact that Commissioner Walker and his accountant stated that the Continental was insolvent, yet since these attacks were made the Association has paid out over Five Hundred Thousand Dollars, and has assets of more than Eight Hundred Thousand Dollars left, which will, properly administered, pay dollar for dollar to each stockholder."

Respectfully submitted:

San Francisco, California, September 30th, 1915.

ARMAND B. KREFT,
Referee in Bankruptcy.

The order reviewed is entered in the record to the effect that the election of the Anglo-California Trust Company was disapproved. The ruling also appears on page 39 of the transcript transmitted herewith.

The following papers are transmitted herewith:

Petition to review.

Transcript of testimony and proceedings.

Exhibits "A" to "J."

ARMAND B. KREFT,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 2, 1915, at 11 o'clock and 45 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [25]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 9509.

In the Matter of CONTINENTAL BUILDING & LOAN ASSOCIATION,

In Bankruptcy.

Opinion and Order affirming Order of Referee Disapproving Selection of Trustee.

N. SCHMULOWITZ, Esq., Attorney for Petitioner.

The Continental Building and Loan Association was upon its own application adjudicated a bankrupt on August 9th, 1915. On August 30th, 1915, the creditors appeared by proxy before the referee for the purpose of electing a trustee. The trustee selected at that time was not approved by the

referee and another election was held on September 15th, 1915. At this election the Anglo-California Trust Company was chosen, but the selection was disapproved by the referee. The order disapproving this selection has been brought here for review. There is also brought here for review the action of the referee in permitting the shareholders of the bankrupt to vote as creditors for the trustee, and the refusal of the referee to permit the Merchants National Bank, which has a claim against the bankrupt for money loaned to it, to select the trustee, as being the only creditor, within the meaning of the bankrupt act, that appeared and offered to vote at the meeting. The amount of the latter's claim is $2,611.20, while the claims of the shareholders voting at this election aggregate $522,437.50. The question as to whether the shareholders can be at the same time creditors is an interesting one, but under the peculiar circumstances of this case need not be definitely determined at this time. The adjudication was had upon the petition of [26] the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors within the meaning of the bankrupt law, the corporation is not insolvent, as the only other claims amount to but $12,198.90, while the assets of the corporation are scheduled at $769,508.13. If therefore the shareholders are eliminated as creditors we have these vast assets with which to pay debts of $12,198.90. No one interested has made any objection to the adjudication and so long as it stands, based on the theory that the shareholders

are creditors, they must be regarded as creditors for all purposes. The Merchants National Bank will be paid in full, whatever happens to the shareholders' claims, and the order denying it the right to select the trustee is affirmed. The selection of the Anglo-California Trust Company was disapproved by the referee, because he found that the selection had been influenced, if not brought about by the officers of the bankrupt, and the attorneys for the bankrupt. His action in so doing is affirmed.

November 9th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Nov, 9, 1915, At 3 o'clock and 10 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [27]

Certificate of Clerk (U. S. District Court) to Certain Documents to be Used on Petition for Revision.

I, W B Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of Praecipe for Transcript, Petition for Review, Referee's Certificate on Petition to Review, and the Opinion and Order of this Court affirming the order of the referee in the matter of Continental Building & Loan Association, Bankrupt, No. 9509, as the same now remain on file and of record in this office; said copies having been prepared in accordance with the above mentioned Praecipe for Transcript.

I further certify that the cost for preparing and

certifying the foregoing copies (consisting of 27 pages, numbered from 1 to 27 inclusive) is the sum of Sixteen Dollars and Ten Cents ($16.10) and that the same has been paid to me by the attorney for petition herein.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court this 30th day of December, A. D. 1915.

W B. MALING,
By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 12/30/15. C. W. C.] [28]

[Endorsed]: No. 2685. United States Circuit Court of Appeals for the Ninth Circuit. W. T. Wilson, Emil E. Lenguetin, Fred F. Connor, John A. Bloom, Lawrence Hobreht and Benj. F. Currier, Petitioners, vs. The Continental Building and Loan Association, a Corporation, et al, Respondents. In the Matter of Continental Building and Loan Association, Bankrupt. Transcript of Record in Support of Petition for Revision Under Section 24b of the bankruptcy act of Congress, Approved July 1, 1898, to Revise, in Matter of Law of a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed December 31, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.